Supreme Court, U.S.
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No. 03-624

In The
Supreme Court of the United States

ANN S. AZDELL AND DONALD B. FISHMAN,

Petitioners,

v.

KAY COLES JAMES, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

A. Respondents Do Not Dispute The Importance Of The MSPB's Authority At Issue Here

The Solicitor General does not dispute the importance of this case, which involves the authority of respondent Merit Systems Protection Board (MSPB) to review the practice used by respondent Office of Personnel Management (OPM) to rank applicants for positions as federal administrative law judges (ALJs). Whether the OPM's practice violates the Veterans' Preference Act (VPA) is important to the integrity of the adjudication process throughout numerous federal agencies, and whether that practice is subject to review by the MSPB and to judicial review is necessarily significant as well.

Indeed, respondent OPM made clear to the court of appeals that this case "presents a serious and substantial question of law that will have recurring importance." Pet. App. 26a. The individual respondents do not appear to dispute that assessment. *See* Meeker *et al.* Br. in Opp. 1-9.

Because the Federal Circuit is the only court of appeals with the authority to address the question presented, respondents cannot, and do not, suggest that the Court await further legal developments in the lower courts. Moreover, further review by this Court would be particularly appropriate in this case because the Solicitor General takes the position that the court of appeals correctly restricted the jurisdiction of respondent MSPB, which is "an independent Government agency that operates like a court," 5 C.F.R. § 1200.1, and was established by Congress to ensure that the other federal respondent before this Court, the OPM, complies with federal law.[1] The Solicitor General suggests in a

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[1] The caption of the Solicitor General's brief indicates that it was filed on behalf of only one federal "Respondent" – the OPM – and not on behalf of the MSPB. As explained in our petition, however, Pet. ii, the MSPB is also a respondent before this Court pursuant to this Court's Rule 12.6. *See also* 5 U.S.C. § 7703(d) (in appeal brought by OPM in Federal Circuit, the MSPB "and all other parties to the proceedings before the [MSPB] shall have the right to appear in the proceeding

(Continued on following page)

footnote that the MSPB's consistent interpretation of 5 U.S.C. § 7701 for more than 20 years be rejected as unreasonable, but does so without addressing the contrary reasoning of the MSPB that was set forth in the MSPB's prior adjudicatory decisions and its petition for rehearing *en banc* to the court of appeals. *See* OPM Br. in Opp. 14 n.4; Pet. App. 146a-164a (reprint of MSPB's rehearing *en banc* petition).

B. The OPM's Arguments Demonstrate The Need For Further Review Because They Are Contrary To The Statute, The MSPB's Interpretation, And The Presumption Favoring Judicial Review, And Would Have Broad Adverse Consequences For MSPB Authority

1. Respondent OPM devotes the bulk of its brief to the merits of petitioners' case (OPM Br. in Opp. 7-16), thereby confirming the importance of the question presented. The OPM contends that the Federal Circuit correctly held that the MSPB lacked jurisdiction over petitioners' argument that the OPM's 1996 scoring formula violated the VPA, 5 U.S.C. § 3309 *et seq*. The OPM argues that, although Congress granted the MSPB appellate jurisdiction over "any action which is appealable to the [MSPB] under any law, rule, or regulation," 5 U.S.C. § 7701(a), that grant of jurisdiction is somehow limited to addressing only arguments that claim a violation of the regulation that gave rise to the jurisdiction. OPM Br. in Opp. 8, 10, 11. That interpretation wholly disregards the statutory scheme established by Congress to govern the standard of review in MSPB appeals.

a. The OPM repeatedly confuses the appellate jurisdiction that Congress established for the MSPB in 5 U.S.C. § 7701(a) and (b), with the standard of review in 5 U.S.C.

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before the Court of Appeals"); Pet. App. 25, 146a-164a (participation by the MSPB as respondent before the Federal Circuit); 5 U.S.C. § 1204(i) (the MSPB has independent litigating authority only in lower courts, not in the Supreme Court).

§ 7701(c), that Congress directed the MSPB to apply to appeals properly before it. *See* OPM Br. in Opp. 8-12. Section 7701(c) is not a source of jurisdiction, nor do petitioners claim that it is, as the OPM suggests. Br. in Opp. 11 & n.2.

Congress addressed the MSPB's appellate jurisdiction in subsection (a) of 5 U.S.C. § 7701 by specifying that an employee or applicant for employment "may submit an appeal" to the MSPB "from any action which is appealable" to the MSPB "under any law, rule, or regulation." 5 U.S.C. § 7701(a). In subsection (b), Congress further provided that the MSPB may hear "any case appealed to it" or, in some instances, may refer the case to another designated official. *Id.* § 7701(b)(1).

Congress turned to the standards of appellate review in subsection (c) of Section 7701. First, Congress provided that the MSPB can sustain an agency decision only if it is supported by substantial evidence, *id.* § 7701(c)(1)(A), or by a preponderance of the evidence, *id.* § 7701(c)(1)(B), depending on the type of agency action appealed. Second, Congress directed that, even if an agency decision meets the threshold standard, the agency decision nonetheless "may not be sustained" by the MSPB if the employee or applicant makes any of the following three showings: (A) that there was "harmful error in the application of the agency's procedures in arriving at such decision;" (B) that the decision was based on a prohibited personnel practice described in 5 U.S.C. § 2302(b) (including discrimination, nepotism, and coercion of political activity); or (C) that "the decision was not in accordance with law." *Id.* § 7701(c)(2)(A), (B), (C).

As the Federal Circuit concluded, Pet. App. 9a, petitioners clearly met the jurisdictional requirements of subsection (a) for submitting an appeal to the MSPB because their appeal was from an action that was appealable under a regulation – 5 C.F.R. § 300.104(a). Section 300.104(a) unequivocally states that "[a] candidate who believes that an employment practice which was applied to him or her by the [OPM] violates a basic requirement in § 300.103 is entitled to

appeal to the [MSPB] under the provisions of its regulations."[2] The OPM does not dispute that petitioners believed that the challenged employment practice – the 1996 scoring formula – violated the basic requirements of § 300.103 and properly appealed to the MSPB. OPM Br. in Opp. 4, 9 n.1. The OPM nonetheless claims that, once the appeal reached the MSPB, the MSPB could not review the employment practice under the standards set forth by Congress in Section 7701(c)(2)(C).[3]

The OPM attempts to curtail the jurisdiction of the MSPB by arguing that, once appealed under 5 C.F.R. § 300.104(a), the MSPB could review the employment practice only to determine compliance with the basic requirements of 5 C.F.R. § 300.103. OPM Br. in Opp. 9-10. But that interpretation disrupts the entire statutory scheme of appellate review established by Congress in Section 7701(c). It would require the MSPB to sustain on appeal OPM decisions that are not in accordance with other laws that govern the OPM (such as the VPA), despite the unequivocal congressional mandate that the MSPB not sustain agency decisions that are not in accordance with law. *See* 5 U.S.C. § 7701(c)(2)(C).

Moreover, the OPM offers no reason to distinguish the "not in accordance with law" review under Section 7701(c)(2)(C), from review under Sections 7701(c)(2)(A) or

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[2] The basic requirements in Section 300.103 are that an employment practice be based on a specified type of job analysis, be professionally developed and rationally related to performance in the position, and not discriminate on the basis of nonmerit factors. 5 C.F.R. § 300.103.

[3] The OPM's later argument (OPM Br. in Opp. 11-12) that petitioners' interpretation means that 5 C.F.R. § 300.104(a) "serves no purpose" because candidates can appeal under that provision without alleging a violation of the basic requirements regulation, 5 C.F.R. § 300.103, is simply wrong. That is not what occurred in this case and, as explained above, cannot occur in other cases because an appeal may be submitted to the MSPB only from an action that is appealable under a law, rule or regulation, including under 5 C.F.R. § 300.104(a), in which instance there must be a belief that an employment practice violated 5 C.F.R. § 300.103.

(B). The OPM's argument would require the MSPB to sustain an agency decision even if there was "harmful error in the application of the agency's procedures in arriving at such decision," 5 U.S.C. § 7701(c)(2)(A), so long as the error was not also a violation of the basic requirements regulation, 5 C.F.R. § 300.103.

The OPM's interpretation also would require the MSPB to sustain an employment practice that was based on a "prohibited personnel practice," 5 U.S.C. § 7701(c)(2)(B), such as coercing the political activity of a person or obstructing a person's right to compete for employment, *see* 5 U.S.C. § 2302(b)(3) &(4), because such grounds are not prohibited by the basic requirements regulation, 5 C.F.R. § 300.103.

The OPM's argument is, in essence, that the MSPB must sustain on appeal OPM actions that are unlawful both procedurally and substantively, so long as they do not violate 5 C.F.R. § 300.103 – a regulatory provision that the court of appeals found the OPM is free to waive at its discretion. Pet. App. 18a. That interpretation would immunize the OPM's actions from much independent review – a result that may well serve the OPM's parochial institutional interests, but is not what Congress intended.

Indeed, the OPM's interpretation, which the Federal Circuit embraced, may have even wider ranging consequences for the authority of the MSPB over OPM actions because neither the OPM nor the Federal Circuit provides any rationale for distinguishing between appeals to the MSPB under 5 C.F.R. § 300.104(a), and appeals to the MSPB under any other law, rule, or regulation. *See* Pet. 10. The OPM disregards the fact that the MSPB is authorized to hear appeals submitted under at least 20 other different laws, rules, and regulations, including several federal statutes. *See* 5 C.F.R. § 1201.3(a)(1)-(21). The OPM does not explain why its interpretation would not mean that, in each of those instances, the statute or regulation authorizing appeal would also limit the standard of appellate review, thereby leaving Section 7701(c) with no role in the process, clearly contrary to Congress's intent.

b. The OPM unsuccessfully attempts to resolve the conflict between the decision below and this Court's decision in *USPS v. Gregory*, 534 U.S. 1 (2001). The OPM suggests (OPM Br. in Opp. 13) that *Gregory* can be read to limit the appellate review authority of the MSPB to review of predicate agency actions only when such review is "essential" to determining the validity of the challenged agency decision as a whole. But, of course, review of the validity of the OPM's 1996 scoring formula under the VPA is essential to determining the validity of the formula as a whole. In any event, the OPM's proposed restriction on *Gregory* is not rooted in the language of the Court's decision or in any statutory text.

The more natural reading of *Gregory* is that Section 7701 grants the MSPB authority to review the entirety of a case that has been properly appealed to it. Indeed, that is consistent with the Solicitor General's view in *Gregory* that, "[t]o enable the MSPB to fulfill [its] 'watch dog' role, Congress gave the Board 'primacy' over the 'administrative resolution of disputes over adverse personnel action,' and vested it with broad adjudicatory powers." Br. for Pet. at 17, *USPS v. Gregory*, No. 00-758 (Apr. 2001) (citations omitted). *Cf. FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 304 (2003) (interpreting "not in accordance with law" language in Administrative Procedure Act to permit a court to review action by the FCC for compliance with the bankruptcy code, a law the FCC was not charged with administering).

2. The Court's review is particularly warranted in this case because the Solicitor General's adoption of the OPM's interpretation leads him to urge abandonment of the MSPB's longstanding and consistent statutory interpretation, without adequate analysis of the wide-ranging consequences discussed above. The Solicitor General's choice between the views of competing federal entities does not, of course, bind this Court. *See St. Regis Paper Co. v. United States*, 368 U.S. 208, 217 (1961).

The MSPB has consistently read 5 U.S.C. § 7701(c)(2)(C) to prohibit it from sustaining on appellate review an agency decision that is "not in accordance with law." As we demonstrated in the petition, the MSPB's interpretation has been

reflected in adjudications dating back more than 20 years. Pet. 25-26 n.5. The OPM does not dispute the existence of this longstanding interpretation. And it conceded below that the Federal Circuit's opinions previously had adopted the same view. Pet. 27-28 & n.6.

The OPM now suggests (OPM Br. in Opp. 14 n.4), however, that the MSPB's interpretation is not entitled to judicial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), not just because it conflicts with the OPM's reading of the statute, but also because Congress did not specifically delegate to the MSPB the authority to interpret Section 7701(c). *See also* Meeker *et al.* Br. in Opp. 5-6. But Congress clearly intended the MSPB to interpret Section 7701(c) through formal appellate adjudicatory procedures. *See* 5 U.S.C. §§ 1204(a)(1), 7701(b)(1).

The Court recently confirmed in *United States v. Mead Corp.*, 533 U.S. 218, 229-230 (2001), that *Chevron* deference is granted to such agency views that are generated through formal adjudication when the statute contains express congressional authorizations to engage in such adjudication. Indeed, the Solicitor General previously explained that Congress intended the MSPB's "case law" to be entitled to judicial deference and that a party "accordingly bears an extremely heavy burden in establishing that a court should substitute its judgment for that of the agency." Br. for Pet. at 17-18, 29, *USPS v. Gregory*, No. 00-758 (Apr. 2001).[4]

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[4] The Solicitor General suggests at one point (OPM Br. in Opp. 14) that an agency's views regarding its own jurisdiction are not entitled to deference, but that view has not been adopted by the Court. *See Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 453 (1999) (granting *Chevron* deference to agency's interpretation of statute that authorizes appeals to administrative board); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring in the judgment) (collecting cases). Such an argument also is contrary to the views expressed by the United States on numerous previous occasions. *See, e.g.*, Br. for Pet. at 49, *INS v. St. Cyr*, No. 00-767 (Feb. 2001); Br. in Opp. 11 n.3, *Shelton v. CPSC*, No. 02-15 (Oct.

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3. The OPM acknowledges (Br. in Opp. 15-16) that the Federal Circuit's and its own interpretation of 5 U.S.C. § 7701, may lead to "certain OPM employment actions * * * not be[ing] subject to judicial review." That situation is contrary to the "'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action'" which has led this Court to "find an intent to preclude such review only if presented with '"clear and convincing evidence."'" *Reno v. Catholic Social Servs.*, 509 U.S. 43, 63-64 (1993) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), and *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)).

Because MSPB review is a necessary predicate to judicial review of this type of civil service challenge to OPM employment practices, *see United States v. Fausto*, 484 U.S. 439 (1988), that presumption in favor of judicial review must also favor a reading of MSPB's authority to allow it to review the legality of such practices. Yet under the Federal Circuit's interpretation, the MSPB and the Federal Circuit lack authority to review the OPM's compliance with federal law and must sustain the decision even when they otherwise have jurisdiction to adjudicate the validity of an OPM employment practice. Such an interpretation is strongly disfavored.[5]

2002); Br. in Opp. 8 n.6, *United Transp. Union v. Slater*, No. 98-627 (Dec. 1998).

[5] The OPM contends (OPM Br. in Opp. 15-16) that leaving employees and applicants such as petitioners without an avenue for administrative or judicial review of OPM employment actions is part of Congress's intended statutory framework as reflected in the Veterans Employment Opportunity Act of 1998 (VEOA), 5 U.S.C. § 3330a. But Congress provided that the VEOA's complaint mechanism "shall not be construed to prohibit a preference eligible [veteran] from appealing directly to the Merit Systems Protection Board from any action which is appealable to the Board under any other law, rule, or regulation, in lieu of administrative redress under this section." 5 U.S.C. § 3330a(e)(1) (Supp. 2003). This provision would make no sense unless Congress believed the MSPB already had jurisdiction over claims that agency decisions violated the VPA.

C. Reversal Of The Federal Circuit's Erroneous Jurisdictional Ruling Will Allow Petitioners To Pursue Complete Relief On Remand

The OPM erroneously contends in closing (Br. in Opp. 7, 16-18) that *certiorari* should not be granted because petitioners do not have an "obvious" means of prevailing on the merits even if the Court reverses the Federal Circuit's holding regarding jurisdiction. The OPM mistakenly believes that, because petitioners did not also seek review by this Court of the Federal Circuit's ruling that an OPM variation acted to waive the basic requirements of 5 C.F.R. § 300.103, petitioners would not be able to obtain relief even if this Court grants review and rules in petitioners' favor.

The variation that the OPM granted itself under 5 C.F.R. § 5.1 is a mechanism that the OPM is authorized to use to waive "the strict letter of [OPM's] regulation[s]" in certain limited circumstances. But the OPM has no authority to grant itself a variation from the statutory requirements of the VPA. Once the OPM elected to use an examination to select ALJ's, *see* Pet. App. 66a-67a, 70a, its conduct was governed by the VPA, 5 U.S.C. § 3309 (1996 & Supp. 2003), which provides that a veteran "who receives a passing grade in an examination" is entitled to receive 5 or 10 "additional points above his earned rating." The MSPB correctly concluded, based on the statutory text and history, that OPM's 1996 scoring formula violates the VPA in two ways. First, the VPA requires that a veteran's preference points be added only "above his earned rating," such that the OPM's 1996 scoring formula violates the statute because it grants 70 *unearned* points to every applicant who completes the examination, regardless of performance, and it imposes the veteran preference points as additional points above that unearned rating. *See* Pet. App. 89a-90a, 109a-110a. Second, and relatedly, the MSPB concluded that Congress intended that veteran preference points be awarded "based on a 100-point scale" of earned points. *Id.* at 89a. The MSPB correctly found that the OPM's 1996 scoring formula, by contrast, unlawfully used only a 30-point scale of earned points. *Id.* at 90a; *see also* Meeker *et al.* Br. in Opp. 1 (explaining that applicants were "given a weighted score based on a range of

0 to 30 points"); OPM Br. in Opp. 7, 16 (describing Federal Circuit as upholding 70 to 100 point scale).

The Federal Circuit failed to address the merits of that ruling due to its erroneous holding that the MSPB lacked jurisdiction to review the argument. If this Court grants review, reverses the Federal Circuit, and remands the case, petitioners will again urge the Federal Circuit to sustain the MSPB's holding that the OPM's 1996 scoring formula was not in accordance with the VPA. If the Federal Circuit so rules, the OPM's 1996 scoring formula will be invalid as a matter of law and cannot be used unlawfully to determine the ranking of candidates for federal ALJ positions. The OPM's variation from certain of its own regulatory requirements could not negate the force of such a judicial ruling. Petitioners would then be entitled to the relief they have always sought and that the MSPB ordered – a proper scoring formula that does not violate the VPA.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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